

# EXHIBIT E

FCBLTAFA

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 NATASHA TAFT,

4 Plaintiff,

5 v.

15 CV 5321 (PAE)

6 AGRICULTURAL BANK OF CHINA  
7 LIMITED,

8 Defendant.

-----x

9 New York, N.Y.  
10 December 11, 2015  
12:14 p.m.

11 Before:

12 HON. PAUL A. ENGELMAYER,

13 District Judge

14 APPEARANCES

15 LAW OFFICES OF SCHWARTZ & PERRY

Attorneys for Plaintiff

16 BY: BRIAN HELLER

DAVIDA S. PERRY

17 WHITE & CASE

18 Attorneys for Defendant

19 BY: GLENN M. KURTZ

KIMBERLY A. HAVIV

EVELYN A. FANNERON

FCBLTAF

(Case called)

THE COURT: We're here on a partial motion to dismiss made by the defense. I'll hear briefly from the defense.

May I ask you just to reset me in the case. There's no motion to dismiss the gender claim?

MR. KURTZ: That's correct, your Honor.

THE COURT: Has discovery been proceeding?

MR. KURTZ: Discovery is proceeding, your Honor.

THE COURT: What's the status of discovery? Just tell me about it.

MR. KURTZ: There's been some exchange of documents on our end. We're continuing to collect and go through documents. It's been a pretty significant effort. We have documents that are housed overseas and in Asia. We've collected hundreds of thousands of documents that we are running electronic search terms through and reviewing for responsiveness for privilege. We've made a couple of productions. It's going on a rolling basis, and we still have some work ahead of us.

THE COURT: Any idea when the document production aspect of discovery will be complete?

MR. KURTZ: Well, I would think in January from our standpoint.

On the plaintiff's side, and I don't want to pre-stage anything, but we have a dispute as to the documents that we think we're entitled to and some information we think we're

FCBLTAFA

1 entitled to. We intended to put that in the front of your  
2 Honor pursuant to your rules through a three-page letter.  
3 We're basically done with it, but I didn't want to end up  
4 blindsiding you or putting counsel to the effort of having to  
5 respond to it or feel like they had to respond to it at the  
6 same time they're preparing for today's application. So we'll  
7 probably file it on Monday.

8 THE COURT: The only problem is you file it Monday and  
9 they respond on Thursday, it's going to be very hard for me to  
10 resolve that before the holidays.

11 MR. KURTZ: I understand that.

12 THE COURT: What's the time sensitivity of this for  
13 you?

14 MR. KURTZ: None whatsoever, your Honor.

15 THE COURT: Fine.

16 MR. KURTZ: We just need to make sure we get the  
17 documents.

18 THE COURT: I appreciate the heads up.

19 Do you have a timetable for when depositions begin?

20 MR. KURTZ: Well, I think our view is that depositions  
21 should take place, at least we would want to start our  
22 depositions of the plaintiff and people like that only after  
23 we've received full production. So it will be keyed to your  
24 Honor's ruling on the matter. The plaintiffs may have a  
25 different view, but they haven't asked us for a deposition yet.

FCBLTAF

1 THE COURT: All right. Thank you. So I'll hear  
2 briefly argument as to the one claim that you've moved to  
3 dismiss.

4 MR. KURTZ: Now, one preliminary matter I wanted to  
5 raise on this, and I don't know who joined us in court, but  
6 during today's argument I intend to reference material that was  
7 submitted to the Federal Reserve Bank of New York. The Federal  
8 Reserve Bank, the Fed, has viewed that as confidential.  
9 Because of that, we've been filing it under seal and I think  
10 that I in effect need a clear courtroom.

11 THE COURT: You're not going to get it. That's  
12 ridiculous. To be very honest with you, there's no reason why  
13 the documents in question can't be referred to at a level of  
14 generality so as not to compromise anybody's confidentiality  
15 interests. But this is the United States. We have an open  
16 courtroom here.

17 MR. KURTZ: Understood, your Honor.

18 THE COURT: The Pentagon papers got published, this  
19 letter can be exposed.

20 MR. KURTZ: We're not invoking the confidentiality  
21 concern. I'm repeating it.

22 THE COURT: I appreciate it. But it's one thing for  
23 the document itself to be under seal; I get that. But for you  
24 to be able to discuss it in court, each of you is a good enough  
25 lawyer to find a way to capture the points that matter without

FCBLTAFa

1 sending the banking system into collapse.

2 MR. KURTZ: I understand, your Honor. Can I have my  
3 colleague approach the Court with a little deck of materials  
4 that I intend to review?

5 THE COURT: Sure. By all means, let's hand up a copy  
6 for me and my law clerk.

7 MR. KURTZ: I assume your Honor is a little short on  
8 time and so I'm going to go right into the claims.

9 THE COURT: By the way, let me apologize -- I should  
10 have at the beginning -- for starting late. I had the  
11 unexpected development of a 25-defendant indictment being  
12 unsealed this week and the initial conference being right  
13 before this.

14 MR. KURTZ: No issue at all.

15 THE COURT: Go ahead.

16 MR. KURTZ: I'm happy we were in the right place.

17 THE COURT: Me too.

18 MR. KURTZ: Your Honor, as we raise in the motion, and  
19 I'll go through today at least two of them, there's three  
20 independent grounds supporting dismissal of the action.

21 And the first one is really I think the simplest.  
22 It's that the claims that the plaintiff brings or brought on  
23 the claim does not report a, quote, possible violation of law  
24 as is required under the statute. The plaintiff does not  
25 identify in the complaint or response to the motion to dismiss

FCBLTAFA

1 any law that was possibly violated. And, to the contrary, the  
2 memo specifically stated there was no applicable law or  
3 regulation, and I reproduced on slide No. 1 a portion of the  
4 memorandum.

5 THE COURT: Can you just help me understand -- and I  
6 think you should be able to describe this in a way that doesn't  
7 compromise anyone's interests -- there's a technical quantity  
8 to the background issue. What's the issue about as to which  
9 guidance is being sought?

10 MR. KURTZ: There was a transaction between banks  
11 where Agricultural Bank of China, ABC for short, is acting as  
12 an intermediary bank. And the transactional documents that are  
13 supplied to the intermediary bank refer to the transaction  
14 parties by alphanumeric designations and not by name.

15 THE COURT: Alphanumeric meaning just acronyms?

16 MR. KURTZ: Just letters and numbers. It's the payor  
17 or the payee.

18 THE COURT: Sorry. These are documents being filed  
19 with the Fed, and the issue is what the regs or rules are as to  
20 how you denote a party's name.

21 MR. KURTZ: The question I think was from a compliance  
22 standpoint, is there something that the bank should be doing  
23 when it receives these types of transactional documents that  
24 don't identify a name of a party but identifies the  
25 transactional parties through alphanumeric designations that

FCBLTAF

1 wouldn't allow you to know who they are.

2 THE COURT: In other words, the rules of the road here  
3 don't relate to the filing of the things with the Fed so much  
4 as does the bank have an independent obligation when it gets  
5 pseudonymous references to parties to demand that they be  
6 identified with more clarity.

7 MR. KURTZ: That's right. But the banks are, and it's  
8 coming from substantial financial institutions, it is something  
9 that everybody is receiving. If you look on slide one which is  
10 the memorandum, there's a lot of references there to having  
11 gone out to others to decide what they're doing about it and  
12 speaking to consulting firms, speaking to other banks, speaking  
13 to regulators to understand it.

14 The most important part is in the second paragraph  
15 where compliance was not able to identify specific regulation  
16 with respect to the scenario and then asks as you can see at  
17 the bottom for guidance, not a reporting of violation, but  
18 seeking guidance.

19 THE COURT: So what would the Fed be looking to in  
20 giving guidance, would it simply be free-form guidance or would  
21 it be an application of a reg or a law?

22 MR. KURTZ: What the Fed could have done if it elected  
23 to do so is issue an advisory letter which does not have the  
24 force of law, which we'll talk about shortly, but they didn't.

25 And otherwise the nature of the relationship is that



FCBLTIFA

1 the bank is very close with the Fed. There's annual  
2 examinations at which time the Fed actually camps out at the  
3 bank. There's quarterly reports. There's all kinds of wire  
4 transfer. It's a pretty iterative relationship and the thought  
5 here was to try to get some guidance. It was considered a few  
6 frontier. That was some of the language used in there.

7 And if you look at slide two, this is the cover memo  
8 that was submitted to the banking department. And, again, it  
9 says subject matter is a request for guidance, not the report  
10 of a violation of law. The first paragraph requests guidance.  
11 The second paragraph, I'm sorry, the last paragraph also asks  
12 for guidance.

13 And if you move to slide three and this one is really  
14 very important to all this because in addition to what we saw  
15 in one where there was a specific acknowledgment that all this  
16 research had been done talking to banks, regulators and the  
17 like and there is no applicable regulation, this one actually  
18 says at the bottom that in asking for guidance, they say we  
19 continue to operate in the most compliant manner. So it's  
20 actually not only asking for guidance, but it's recognizing  
21 that the bank is in compliance, that it's not violating  
22 anything.

23 THE COURT: Suppose that the bank had used less  
24 euphemistic language and said we're worried that we might be  
25 violating the law rather than putting it this way. I don't

FCBLTAFA

1 know why a bank would do that. A well counseled bank would  
2 presumably want to spot the issue but not in a way that  
3 suggests consciousness of guilt. What would that law be?

4 MR. KURTZ: There is no law. The plaintiff has not  
5 been able to identify any law because there's no law. There  
6 was a response; no law was designated. There's no violation of  
7 law.

8 And your Honor put your finger on something which is  
9 why would the bank do that. Well, whistleblowing isn't really  
10 a bank reporting. That's not covered by whistleblowing. When  
11 you ask for best practices, there's no ask for best practices  
12 statute. There's whistleblowing. So normally what happens is  
13 you have someone outside of the bank that blows a whistle.

14 THE COURT: But is there any reason why -- let's  
15 suppose that Ms. Taft thought the bank was violating the law.  
16 The best she could do would be to get the bank to water down  
17 the memo to the Fed. And having done that and the bank having  
18 acceded to filing a watered down memo, let's suppose there was  
19 massive retaliation against her for doing so. Does the fact  
20 that she was lobbying to get this whistle blown within the  
21 bank, the fact that she holds her job, would that categorically  
22 disqualify her from relief, assuming there's a real violation  
23 of law here?

24 MR. KURTZ: That's the issue is, one, you're looking  
25 at the report itself and this is the record. It's not some --

FCBLTIFA

1 and there's nothing in the complaint about whatever you're  
2 posturing there.

3 THE COURT: Understood.

4 MR. KURTZ: But if we want to get into how the law  
5 would work under those circumstances, if the bank reports  
6 itself and seeks guidance as it does here, that's not  
7 actionable. That's a request to understand your obligations.  
8 It's not a report. Everybody knows what whistleblowing looks  
9 like and it doesn't look like this. It looks like here's the  
10 problem, it's a violation of law, and I can't get anybody to  
11 look at it. It doesn't come from the bank itself.

12 THE COURT: Let's assume this fact pattern. Assume  
13 that the bank retaliated against her and made her life  
14 miserable and cost her her job, but what it retaliated for was  
15 not a violation of law but the fulsomeness of her disclosure.  
16 And, you know, in effect there had been a battle royal within  
17 the bank about how to write this memo. And although it doesn't  
18 deal with a disclosure of a violation of law, there's clearly a  
19 battle about how much or how little to share. Just suppose  
20 that were the case. Would there be any legal relief she would  
21 have?

22 MR. KURTZ: There would not be. The whistleblowing  
23 statute applies only with respect to reporting of possible  
24 violations of law.

25 THE COURT: Is there any other statute that would

FCBLTAFA

1 protect an employee from retaliation if it were hypothetically  
2 shown that the retaliation were solely for wanting to do more  
3 as opposed to less fulsome in a letter seeking guidance?

4 MR. KURTZ: Without having researched what other  
5 remedies and under other statutes one might have, I'm not  
6 aware, certainly, not under the Bank Secrecy Act which  
7 requires -- the most recent court on this is the *Segarra* case  
8 out of this district and I've got some slides on that as well,  
9 your Honor, if you were to flip to page 5 of the slides. This  
10 is a Southern District case where there was a report about  
11 Goldman Sachs not complying with certain conflicts of interest  
12 provisions. There was actually an advisory opinion, an  
13 advisory letter that had been issued by the feds. And so there  
14 was something that was actually written on it. They chose to  
15 go public on it. There was a way you were supposed to do this.  
16 They were telling you to do that. And there was no doubt that  
17 there was a violation of that advisory letter.

18 The court dismissed the whistleblower claims because  
19 an advisory letter doesn't have the force of law. Even though  
20 it's an utterance, even though it's a policy, it doesn't have  
21 the force of law and it has to be a force of law. So this  
22 doesn't just happen to be a statute that's designed to protect  
23 circumstances that your Honor is posturing here.

24 THE COURT: Is there any follow-up in the  
25 communications with the Fed that you can proffer to me, did the

FCBLTAFA

1 Fed come back and cite a law?

2 MR. KURTZ: No. I mean the feds came back. There's  
3 no allegation that there was adverse action or that there was  
4 an instruction specific.

5 THE COURT: I'm just curious. Your position  
6 understandably in light of the way this is all formulated is  
7 that we're in an area where there is in fact no guidance of any  
8 form, including even anything short of a regulation, and you're  
9 seeking advisory --

10 MR. KURTZ: -- guidance.

11 THE COURT: A letter, and I'm curious whether the Fed  
12 responded to Ms. Taft's letter, perhaps despite the way she  
13 framed it in terms of guidance, the Fed came back and said  
14 you're silly, there's a statute on point.

15 MR. KURTZ: No. They identified no governing law and  
16 no violations that I'm aware of and no adverse consequences.  
17 None of that is pled in any case.

18 THE COURT: Even the subsequent communications don't  
19 make this a legally marked area.

20 MR. KURTZ: Correct. Just before leaving *Segarra*,  
21 it's notable that just this last September the Second Circuit  
22 affirmed that decision.

23 THE COURT: Understood.

24 MR. KURTZ: So that's the law in this circuit.

25 I thought that what was interesting in the opposition

FCBLTIFA

1 to this argument is plaintiff's assertion that now what she was  
2 really doing was pointing out a loophole. That's not in the  
3 complaint. That's not really before your Honor at all. But I  
4 found it notable anyway because a loophole, it means there's an  
5 omission in the law that allows you to engage in the conduct.  
6 So you wouldn't have a violation of law if you have a loophole.  
7 That's why people try to close loopholes so people can no  
8 longer violate it. Obviously, this is not a legislative  
9 statute. If you find ways the law should be, the report would  
10 have been to Congress presumably under those circumstances.

11 So the first global issue that's really very clean  
12 here is that there's just no violation of law. And *Segarra* is  
13 the most recent case that addresses, but also the *Hill* case,  
14 which is the Sixth Circuit case. I've got a slide on that on  
15 slide No. 8 where this was a more serious type of an inquiry  
16 that was made because it involved a SAR filing. As your Honor  
17 knows, that's a criminal matter.

18 THE COURT: I do.

19 MR. KURTZ: And the Sixth Circuit said that's a  
20 question. That's a request for guidance. That's not a  
21 possible violation of law. It's a request for guidance. And  
22 so that case was dismissed as well. So that's the first  
23 ground.

24 And, by the way, we also gave your Honor some other  
25 cases. I won't walk through them, but they're on pages 12 and

FCBLTIFA

1 13 of the brief -- the Ted Turner case, the Pen Royal case, the  
2 Forrester case -- where courts also made clear that when you're  
3 asking for guidance, you're not making a report. And, of  
4 course, the policy behind that is you're supposed to be able to  
5 go to the regulators and talk about these things and without  
6 having to undergo whistleblower issues.

7 The second issue that I wanted to address today is the  
8 fact that this request for guidance was not a rogue employee  
9 that submitted, as your Honor said, why would anybody do it  
10 because people do it and then they're whistleblowers outside of  
11 the bank. This was done on behalf of the bank, as an agent for  
12 the bank. As I mentioned, there's a pretty substantial  
13 relationship between the regulators and the banks. They have  
14 chief compliance officers, legal resources, as everybody else  
15 does, lots of people who interact, and you interact with them  
16 frequently in your job to identify problems. If you see a  
17 problem, you identify it.

18 THE COURT: Let's suppose we can take the violation of  
19 law issue out of this and change the hypothetical to a  
20 no-doubt-about-it violation of law, but let's assume that  
21 Ms. Taft in her compliance role is trying to say more and the  
22 bank is getting her to say less and the memo that is submitted  
23 is only part way and they then punish her for her advocacy that  
24 the memo be more explicit or more detailed. Does the fact that  
25 she holds this job and that something was submitted on behalf

FCBLTAFA

1 of the bank disentitle her to whistleblower credit? That seems  
2 improbable.

3 MR. KURTZ: I don't think that hypothetical would give  
4 rise to a whistleblower claim because you would have the first  
5 report which was by the bank on behalf of the bank. So you're  
6 doing it as an agent, not as a whistleblower. If you're  
7 telling me that there were aspects of the conduct at the bank  
8 that was not described in the report, then she failed in the  
9 offering submitted to the regulators. You have to submit it on  
10 your own and you have to have it be a violation.

11 THE COURT: Is it sort of an act/omission distinction  
12 where if she is an employee, she can only be punished for that  
13 which she says, not that which she is cowed from saying?

14 MR. KURTZ: I think the way I would rephrase that is  
15 mechanically, one of the elements of the claim is you have to  
16 report to the regulators. There's no whistleblower protection  
17 if you don't report.

18 THE COURT: So someone who would be a whistleblower  
19 who is in trouble, who is checked, who basically says inside  
20 you've got to report this, you're got to report that violation.  
21 And ultimately the bank says if you do that, we're going to  
22 punish you. She doesn't do that and she gets punished anyway.

23 MR. KURTZ: That's not whistleblower.

24 THE COURT: What is that?

25 MR. KURTZ: I guess you'd have to formulate some other



FCBLTAF

1 claim based on -- whistleblowing, I think the law is absolutely  
2 black letter clear and I think there's a number of cases and we  
3 could submit them to your Honor if you want after this hearing  
4 that says the prerequisite is the whistleblowing. So, in other  
5 words, she says I'm about to blow a whistle and you grab the  
6 whistle and say I'm going to mute the sound and then you fire  
7 her, she hasn't whistle blown. She has whatever issues she  
8 has, but she doesn't have whistleblowing because she didn't  
9 blow the whistle. She didn't make the report. It's just the  
10 way the statute works.

11 THE COURT: In other words, the statute, from a policy  
12 perspective, you're saying might, if you will, have a hole  
13 insofar as it permits the stifling of the blowing of the  
14 whistle, but it doesn't provide a remedy for a person who is  
15 stifled before they get to blowing the whistle.

16 MR. KURTZ: Yes. That's not how the statute works.  
17 There may be other ways that Congress would like to address  
18 that behavior, but that's effectively an employment matter and  
19 that's really not what Congress is normally playing. I will  
20 say there are other statutes that provide remedies for internal  
21 reporting, but the Bank Secrecy Act, which is the only statute  
22 that's before your Honor, the only claim here, doesn't have  
23 that provision, and instead it requires you had to blow the  
24 whistle. If someone kept you from blowing the whistle, you're  
25 not a whistleblower.

FCBLTAFA

1 THE COURT: What's your best case that says you have  
2 to actually blow the whistle?

3 MR. KURTZ: I don't think that was a part because  
4 you're giving a hypothetical what wasn't in the case. So I  
5 will be happy to provide your Honor with those case cites.

6 THE COURT: Without arguing the point, I'm happy to  
7 get a letter from you just identifying authority. And,  
8 plaintiff, you may do the same, but I'm not looking for  
9 argument. Just by the end of Monday if you each want to get me  
10 a letter that literally addresses the issue, identifies legal  
11 authority on the proposition that the failure to blow the  
12 whistle, if you will, that the statute doesn't reach  
13 communications not made.

14 MR. KURTZ: Nonwhistles.

15 THE COURT: Right. Just give me the case and the pin  
16 cites. I don't need or invite argument.

17 MR. KURTZ: Sure. We will do that, your Honor.

18 Then for the rest of the second point where it's on  
19 behalf of the bank, you'll see from the record that she even  
20 communicates to the New York Fed that there was a lot of delay  
21 in the memo because there was a lot of internal discussions to  
22 address it. Even the complaint admits that the report went in  
23 for the bank with the bank's permission and so on. Banks can't  
24 report on themselves. That's not what whistleblowing is.  
25 Plaintiff hasn't cited a single case where there a

FCBLTIFA

1 whistleblowing claim is sustained where it went in on behalf of  
2 the bank. "We" is used all throughout.

3 Also just to go back to the first point, the plaintiff  
4 also hasn't been able to cite a single case where a  
5 whistleblowing claim was sustained where there was not a  
6 possible violation of law identified, specifically identified.  
7 All the cases go the other way and we cited them.

8 There's sort of a related topic in here which is what  
9 happens when you don't actually report on behalf of as an agent  
10 of a bank, but nonetheless that reporting would have been  
11 within the scope of your duties and responsibilities. The *Wolf*  
12 case, which I have reproduced some of on page 13, addresses  
13 that circumstance. In that case the court found that where it  
14 is your job to identify compliance issues and report them, you  
15 have a duty to the employer to do that because clearly the  
16 employer always wants to report it. It's only an individual at  
17 the employer who could have an issue with it. And so you don't  
18 get a claim.

19 There's a few Fair Labor Standards Act claims. That's  
20 not our statute, but by analogy on slide 14 I've reproduced  
21 some of that where if the employee doesn't step outside its  
22 role, then it's not protected. And the First Circuit's case  
23 where they say never crossed the line from being an employee  
24 merely performing his job to an employee lodging a personal  
25 complaint and they didn't engage, therefore, in protected

FCBLTAFA

1 activity.

2 Now, in addition to the fact that there's an agency  
3 relationship and this was done for and on behalf of the bank  
4 and with the bank's letterhead and so on, this also is a chief  
5 compliance officer and so it was within her scope of duties.  
6 The plaintiff relies that this is the kind of legal issue that  
7 we're facing on this one. Again, it doesn't have a lot to do  
8 with the agency, but it's an additional ground. Plaintiff  
9 relies on *Balko*, a Southern District case. Again, *Balko* didn't  
10 have -- this was an actual rogue reporter. It wasn't one of  
11 the agency cases. But, in addition, it's not a case that was  
12 decided under our statute. It was decided under the  
13 Whistleblower Protection Act.

14 And if you turn to page 16, you'll see why that's  
15 really significant. That statute, as the court held, was  
16 amended in 2012 and specifically provided that an employee's  
17 claim was not excluded because it was made during the normal  
18 course of duties. Plaintiff's claim here is not brought under  
19 the Whistleblower Protection Act.

20 THE COURT: Could it have been brought under that  
21 statute?

22 MR. KURTZ: There was originally a claim brought under  
23 that statute, but we're not federally insured. So that claim  
24 was voluntarily dismissed.

25 THE COURT: I see. Was there a reason why the scope

FCBLTIFA

1 as to these matters of the Bank Secrecy Act and the  
2 Whistleblower Protection Act appears to be a little different?

3 MR. KURTZ: I'll turn again to page 17 to give you the  
4 consequence. It's different because Congress chose in the  
5 Whistleblower Protection Act -- which is different -- there's  
6 different standards of proof; there's differences in the  
7 statute -- they chose to amend that statute specifically to  
8 permit employees to bring claims not when they're acting as an  
9 agent, but claims even if they're reporting within the scope of  
10 their duties and responsibilities. They didn't do that.

11 THE COURT: Any reason why? I'm trying to understand  
12 why Congress would draw that distinction.

13 MR. KURTZ: It's not clear why Congress did that. But  
14 what is clear is the black letter law that when you're  
15 construing a statute, if they amend one and they don't amend  
16 another, that means something. That's intentional. That's  
17 purposeful. So for whatever reason, Congress thought it was  
18 appropriate to make an exclusion in the Whistleblower  
19 Protection Act. They have not done that -- for good reason or  
20 for bad reason, I won't comment on it -- they have not adopted  
21 any such amendment with respect to the Bank Secrecy Act. And  
22 so that's why *Balko* wouldn't apply here, or, if it did apply,  
23 then it would get it wrong in my view because there's no  
24 indication that it considered that issue, that it was briefed,  
25 that it decided it. But when Congress amends similar statutes

FCBLTAFA

1 in two different ways, it means something.

2 THE COURT: All right. Thank you.

3 Let me hear now from plaintiff's counsel. Will it be  
4 Mr. Heller?

5 MR. HELLER: Yes. Thank you, your Honor.

6 So just to give some background to what the technical  
7 issue was for the Court, so the real issue was the Agricultural  
8 Bank of China moves money all over the world from one country  
9 to another. And if they want to move money in U.S. dollars,  
10 which they do, they have to have a branch in the United States,  
11 which is why this branch was so important. And they're moving  
12 money all other the world with the home office in China.

13 As the chief compliance officer, Taft is responsible  
14 for making sure that all the rules are complied with. One of  
15 those rules is the travel rule, which is part of the Bank  
16 Secrecy Act. It's codified in the CFR. It does have the force  
17 of law. So already we've distinguished *Segarra*.

18 THE COURT: Where is that cited in the complaint, this  
19 travel rule?

20 MR. HELLER: The travel rule itself is not cited in  
21 the complaint. And, frankly, the statute doesn't need to be  
22 identified specifically.

23 THE COURT: I'm just trying to -- some things have be  
24 cited in the complaint for me to --

25 MR. HELLER: We talked about the Bank Secrecy Act and

FCBLTAFA

1 BSA and anti-money laundering issues.

2 THE COURT: All right. You're saying that implicitly,  
3 though not explicitly, her memo is reporting a possible  
4 violation of the travel rule.

5 MR. HELLER: Yes.

6 THE COURT: You're going to have to help me here  
7 because it's not in your complaint.

8 MR. HELLER: Understood. Frankly, we're way beyond  
9 the standard that the complaint needs to be. It needs to be a  
10 short and plain statement. It says she reported possible  
11 violations of law. They retaliated against her. And what the  
12 argument here on this motion is if you look at the argument, if  
13 you look at the facts in the complaint in the light most  
14 favorable to the defendant, there's an argument that the case  
15 should be dismissed.

16 THE COURT: Wait. But if an element of this is a  
17 possible violation of law and no law is specified in the  
18 complaint or in the cognizable document which appears to be  
19 seeking guidance, don't you at least have to identify what the  
20 law would be?

21 MR. HELLER: We did. We identified the Bank Secrecy  
22 Act. To say we have to identify --

23 THE COURT: Is the travel rule a subset of the Bank  
24 Secrecy Act?

25 MR. HELLER: Yes. Yes. But the technical aspect of

FCBLTAF

1 this, to have to put this in a complaint seems onerous and  
2 unnecessary.

3 THE COURT: Sorry. Now you're provoking me. How  
4 onerous would it have been to cite the travel rule if you  
5 actually had a violation of law in mind? Unpack for me the  
6 onerousness to you of citing it.

7 MR. HELLER: If we had just written that she alleged  
8 violations of the Bank Secrecy Act travel rule provision, if we  
9 had just added that clause travel rule, that seems --

10 THE COURT: The problem is the memo that actually was  
11 submitted on its face looks for all the world like it is  
12 seeking guidance in an area as yet uncharted by the law.

13 MR. HELLER: Yes, and that's what it is on its face  
14 and that's really what the heart of this is. There needs to be  
15 context put to this memo because like the complaint alleges,  
16 she first brought her concerns to the bank and they told her  
17 you're wrong.

18 And just to give some background to what her concerns  
19 were, the bank is moving money all throughout the world. Her  
20 job as the chief compliance officer is to make sure that the  
21 bank is able to see where the money originated and to where  
22 it's going and that's what's required by the Bank Secrecy Act  
23 and that's what her job is to ensure. She's personally  
24 responsible to make sure that's the case. If it's violated,  
25 she's subject to \$25,000 per day fines, criminal sanctions,



FCBLTAF

1 injunction against working in the industry. We cited in our  
2 motion, a year ago, December 2014, the United States brought an  
3 action against a chief compliance officer for failing to  
4 enforce the Bank Secrecy Act.

5 THE COURT: The travel rule or something else?

6 MR. HELLER: I believe it was the travel rule and  
7 possibly others. But, regardless, the Bank Secrecy Act is  
8 really just a number of anti-money laundering regulations that  
9 are in place, a whole amalgamation. It's not just one rule.  
10 It's this grouping of statutes and regulation.

11 And so she said we can't see where the money is coming  
12 from or where it's going to. And the bank's response was it's  
13 okay, there's this other regulation that says we don't have to  
14 do it. And she says I don't think that's acceptable. I don't  
15 think that's going to pass with the regulators and I'm on the  
16 hook for this, so we need to go forward with this. That's what  
17 this resistance that she felt was.

18 So, ultimately, like the complaint says, they let her  
19 go to the bank with this euphemism of we're seeking guidance,  
20 that there's no regulation at issue. What she's really  
21 pointing to is this hole to get around the strict regulations  
22 of the Bank Secrecy Act, which is really at the direction of  
23 the home office in China.

24 THE COURT: The bank approved the memo as submitted to  
25 the Fed, correct?

FCBLTAFA

1 MR. HELLER: As submitted to the Fed, yes.

2 THE COURT: So to the point that I was speaking about  
3 with defense counsel, it sounds as if the retaliation that  
4 you're spotting is not that she's being retaliated for  
5 submitting a memo that the bank permitted, but rather for her  
6 advocacy, which was denied, that it didn't say more. Is that  
7 correct?

8 MR. HELLER: No, your Honor. Respectfully, it started  
9 when the Fed responded to her memo because up until -- she sent  
10 the memo. They said this is nothing. This isn't a problem.  
11 You're wrong. And then the Fed responded. As counsel prefaced  
12 his comments, the Fed's response is highly confidential and was  
13 not something that we believe should be put in the memo.  
14 Frankly, we received a phone call from the Fed the day after we  
15 filed this lawsuit about what we put in the initial complaint.  
16 So our ability to talk about what the Fed said is hampered and  
17 limited by confidentiality.

18 THE COURT: Look, then you attach something that's  
19 sealed. The reality is I've got to be able to make sense --  
20 the Fed's response is cognizable on the motion to dismiss,  
21 correct?

22 MR. HELLER: And it's in the complaint. What it says  
23 is as a result of the Fed's response, the bank took action.  
24 They hired an attorney and they became angry at her because  
25 they had to fix a number of things before the next

FCBLTAF

1 investigation by the regulators, before the next audit, if you  
2 will. And that's when the retaliation started, in February.  
3 So what really is being alleged, this idea that the memo didn't  
4 say anything, it's taking it out of context.

5 THE COURT: Wait. The Federal Reserve Bank of New  
6 York responded by letter. I have no idea what the Fed said.

7 MR. HELLER: And we don't have the letter, your Honor.  
8 We actually made an application to the Fed to get those  
9 documents and we received them this morning before we were  
10 leaving for court.

11 THE COURT: Have you reviewed them?

12 MR. HELLER: No. We were literally walking out the  
13 door when we got them. But that's why this case is not ripe  
14 for a motion to dismiss. This case is all about context.

15 THE COURT: Why isn't it ripe for a motion to dismiss  
16 with leave to replead? Rather than just sort of saying there  
17 may be a pleadable claim here, why isn't the other way to say  
18 you're not there, but if you feel there's something that you  
19 can add that would fortify the claim, you ought to have a right  
20 to replead, why isn't that the way to better deal with it?  
21 Usually we don't say you can go forward because you might be  
22 able to plead a claim; it's you can't go forward but have at it  
23 again.

24 MR. HELLER: That would change the rules. That would  
25 change the burden on a compliant.

FCBLTAF

1 THE COURT: No. The rule would be you have a right to  
2 amend.

3 MR. HELLER: But initially, instead of having a short  
4 and plain statement, we'd have to have essentially a bill of  
5 particulars that looking at the complaint the way it's written,  
6 looking at the amended complaint, it clearly sets forth the  
7 cause of action. What the defendant does is say, well, look at  
8 these extraneous facts. Look at this memo in the light that we  
9 want you to. We didn't attach the memo. They're saying look  
10 at the memo in the light we want you to and then you'll see  
11 there's no claim. If you look at it in the light the plaintiff  
12 says, its full of euphemisms. And like your Honor had pointed  
13 out when asking questions to defense counsel, it's hesitant.  
14 Nobody is going to say we think there's a violation of law.  
15 For plaintiff to have to somehow respond to that in the  
16 complaint, that seems like a very difficult task because  
17 there's no way to do that. There needs to be testimony.

18 THE COURT: There would have been the possibility in  
19 the complaint of actually unpacking more than citing something  
20 general like the Bank Secrecy Act what the violation of law  
21 presented was. It certainly wasn't obvious to me that the  
22 practice on which guidance is sought was one as to which there  
23 was a law in place that was being violated, or arguably, as  
24 opposed to an area where the law had not spoken and where the  
25 bank was thoughtfully trying to spot a hard issue. Those are

FCBLTIFA

1 very different things and there are loads of areas of  
2 regulation that don't involve an as yet charted law. It is  
3 candidly unhelpful to simply say the Bank Secrecy Act and then  
4 assume that I can say, oh, that's a violation of law because  
5 some statute got mentioned. You can say the U.S. code too, but  
6 at some level you need to explain what the asserted violation  
7 is of.

8 MR. HELLER: Absolutely agreed. But where is that  
9 setting, where does the plaintiff have to come forth with  
10 evidence about what the violation was.

11 THE COURT: Not evidence. It's the law as part of the  
12 statute. And the problem is that I'm a little bit puzzled by  
13 the resistance to the idea that the right way to deal with this  
14 might not be to give you a chance to replead if a problem like  
15 this is found.

16 MR. HELLER: We certainly could replead, but frankly  
17 we're going to have to file it under seal. And the concern  
18 that the plaintiff has is how does this affect any further  
19 pleadings that any plaintiff might have in the whistleblowing  
20 context that now there has to be a specific allegation. And  
21 frankly we're going to need evidence about the context of  
22 writing this memo, about the conversations that were had, the  
23 emails that were had, the emails that we're waiting for about  
24 how this document was drafted because there was conversations  
25 that the plaintiff had with the Fed about what the violations

FCBLTAFA

1 were that she made the defendant aware of.

2 THE COURT: Is the allegation here that your client is  
3 being punished for what she said or what she was cowed from  
4 saying?

5 MR. HELLER: For what she said, your Honor. I know  
6 that your Honor is asking about where there was no complaint.  
7 She blew the whistle and they didn't appreciate the gravity of  
8 what she did.

9 THE COURT: She blew a whistle that they gave to her  
10 and they authorized the extent of the blowing of the whistle.  
11 In other words, you acknowledge to me that the bank even might  
12 have preferred otherwise, acceded to her filing this memo; and  
13 the memo is on its face written on behalf of the bank within  
14 the scope of her duties. Much as they may have resented and  
15 been unhappy about having a, if you will, squeaky clean  
16 employee, I have to evaluate this in the light of statutory  
17 terms, not norms and ethics.

18 If the statute applies to whistleblowing, does it  
19 apply where a compliance officer is submitting a memo that was  
20 authorized by the bank to be sent, whatever their subjective  
21 feelings were about it?

22 MR. HELLER: The answer to that in this district is  
23 yes.

24 THE COURT: What case?

25 MR. HELLER: The *Balko* case that defendant has

FCBLTAFa

1 desperately tried to distinguish. But in *Balko*, it was a 2014  
2 case, that was not a rogue compliance officer like defendant  
3 alleged. That was someone who was part of the bank doing their  
4 job for the bank and the defendant argued that that was part of  
5 her job, that this plaintiff in *Balko* going to the Fed --

6 THE COURT: Defense says *Balko* is a different statute.

7 MR. HELLER: They relied on *Wolf*. *Wolf* was a  
8 different statute.

9 THE COURT: Sorry. This isn't a schoolyard. It's a  
10 courtroom. I'm not here to evaluate what they did in some  
11 other context. I've raised with you a distinct issue they  
12 raised, and you need to explain to me rather than throwing a  
13 mud ball at the defense why the fact that *Balko* is based on a  
14 different statute with different language doesn't undermine its  
15 application here. Please answer that question.

16 MR. HELLER: *Balko* is not based on different statutory  
17 language. It's based on a different statute with identical  
18 statutory language just covering different entities. And,  
19 frankly, it cites a number of other statutes.

20 THE COURT: *Balko* is I gather applying  
21 Section 2302(2). That's at page 16 of the slide here. Is  
22 there comparable language in the Bank Secrecy Act?

23 MR. HELLER: Yes, your Honor.

24 THE COURT: What is it?

25 MR. HELLER: The exact whistleblower provision is

FCBLTIFA

1 identical in the Bank Secrecy Act, in FIRREA, in the federal  
2 credit, they're all the same language. And, frankly, in *Balko*  
3 the court noted this issue.

4 THE COURT: In other words, this provision, 2302  
5 basically says that disclosure made during the normal course of  
6 duties of an employee is not excluded... from coverage under  
7 the WPA. You are representing to me as an officer of the court  
8 that that language is in the Bank Secrecy Act?

9 MR. HELLER: No, your Honor. What I'm representing  
10 that in *Balko*, the court applied this to a comparably worded  
11 statute.

12 And if I might just go back a little bit further. The  
13 reason why I bring up *Wolf*, the case defendant cites, in *Wolf*  
14 the court said that if the person is doing their job in the  
15 course of their duties, they're not protected as a  
16 whistleblower and it cited the Whistleblower Protection Act in  
17 support of that. And a year later, Congress amended the  
18 Whistleblower Protection Act with this exact provision. And in  
19 *Balko* the court said, well, *Wolf* said that, but then Congress  
20 amended the Whistleblower Protection Act so the law is changed.  
21 So what I'm saying --

22 THE COURT: Right, but is the notion that the later  
23 change to the Whistleblower Protection Act without changing the  
24 Bank Secrecy Act implicitly carries an intent to change the  
25 Bank Secrecy Act? Presumably, the Bank Secrecy Act is adopting



FCBLTAF

1 the law as it stood at the time of its enactment as opposed to  
2 giving a blank check to revise the terms of the BSA as other  
3 statutes but not a change. That's unusual.

4 MR. HELLER: Because there's many different  
5 whistleblower statutes. And in *Balko* what the court said was  
6 because it recognized this concern and said because the Second  
7 Circuit has not spoken directly about the requirements for  
8 claims brought under this particular -- it was the Federal  
9 Credit Union Act, the court relies on this circuit's  
10 interpretation of comparably phrased antiretaliation statutes  
11 in construing and applying the FCUA to *Balko*'s claim. It  
12 relied on cases talking about Sarbanes-Oxley, about FIRREA.

13 THE COURT: Did it rely on any statutory provision  
14 adopted after the adoption of the statute at issue?

15 MR. HELLER: Well, this is one of a few cases that  
16 came out after the adoption of that provision, and it applied  
17 it to a law other than to the Whistleblower Protection Act. So  
18 the argument that unless Congress applies this exact provision  
19 to every single whistleblower provision, that was rejected in  
20 *Balko*. They found it without merit. It was very strong  
21 language that *Balko* had. And it said Congress overruled the  
22 reasoning of those cases, citing *Wolf*, by adding subsection F  
23 to the WPA which states that employee is not excluded from  
24 whistleblower protection simply because her disclosure is made  
25 during the normal course of her duties and cites another case

FCBLTAF

1 law, Leshinsky from Southern District in 2013, that said in  
2 rejecting the federal circuit's narrow reading of the WPA,  
3 Congress made crystal clear its intent that any whistleblower  
4 who reports misconduct by one of the enumerated channels be  
5 protected under federal whistleblower statutes. And that makes  
6 sense given the regulatory scheme that Congress has in place.

7 As chief compliance officer, it is Taft's job to make  
8 sure the bank stays honest. They talk about the relationship  
9 that the bank has with the Fed, with the regulators; that's  
10 what the compliance officer does. And she's personally  
11 responsible. So there's this tension because and, frankly, to  
12 say she's not protected would really -- that's why the WPA was  
13 amended, so that chief compliance officers doing their jobs are  
14 protected against whistleblowing. And I would submit that we  
15 at least need a record on this before any real decisions can be  
16 made about what happened in this case.

17 THE COURT: All right. Thank you.

18 Just a couple minutes of rebuttal.

19 MR. KURTZ: Your Honor, I only want to make a couple  
20 of brief points.

21 One, on the travel rule, that's not included in the  
22 complaint. That's not included in the memorandum. Counsel  
23 said --

24 THE COURT: Do you have any knowledge about what the  
25 travel rule says?

FCBLTAF

1 MR. KURTZ: I don't have any knowledge about any  
2 violations of the travel rule and I haven't studied it.

3 THE COURT: Your point is it's not cognizable; it  
4 hasn't been pled.

5 MR. KURTZ: That's right. We didn't brief it because  
6 it wasn't pled. It wasn't in the memo.

7 But counsel said that the memo is the operative  
8 document and it is what it is on its face and that she was  
9 punished for what she said in response to your Honor's question  
10 about is it for what she said or didn't say. That's the  
11 document that governs. It's a part of the motion to dismiss;  
12 it's properly a part. And it asks for guidance and it  
13 specifically says that we weren't able to identify any  
14 regulation. So, and I don't think the plaintiff is alleging  
15 that she lied to the regulators.

16 THE COURT: Your point is that was the place in which  
17 to say we're seeking compliance as to whether we comply with  
18 the travel rule or not.

19 MR. KURTZ: Correct.

20 THE COURT: On the contrary, she said, appears to be a  
21 free field.

22 MR. KURTZ: Correct. So she's not blowing the whistle  
23 on a violation. She's saying the exact opposite -- there's no  
24 violation, there is no law, but can you give us some guidance  
25 on it anyway.

FCBLTIFA

1           The next point I wanted to really briefly address is  
2   *Segarra* is one of the cases that talks about the action being  
3   tied to what you say, not to what you don't say; and it's  
4   particularly relevant to counsel's argument about some alleged  
5   unpled scheme to prevent her from saying what she wanted to  
6   say. It says at page 310, quote, Section 1831(j) protections  
7   attach when an individual discloses protected information to a  
8   third party, not when she is asked to alter that information.  
9   So it's not about concealment or omissions or anything like  
10   that.

11           I think it's clear, but just to make sure it's clear  
12   that Section 2302(2), that specifically says if you're an  
13   employee acting in the scope of your duties, you're not  
14   precluded, that's an amendment to the WPA. That's not an  
15   amendment to Bank Securities Act.

16           THE COURT: I think Mr. Heller's argument is that this  
17   is part of a web of bank secrecy statutes and the BSA was  
18   intended to pick up, if you will, the law vis-a-vis other bank  
19   secrecy statutes. Why isn't a subsequent amendment to one of  
20   those statutes also something that in effect informs the  
21   meaning of the BSA.

22           MR. KURTZ: It actually does the opposite. There's  
23   dozens of whistleblowing statutes. Some of them are  
24   incorporated, as I mentioned, FIRREA incorporates the WPA. So  
25   he would have been right with respect to the dismissed claim.

FCBLTIFA

1 The Bank Secrecy Act does not incorporate.

2 THE COURT: What's the reason for that? Is there some  
3 reason why there's more solicitude to the employer in the bank  
4 secrecy context?

5 MR. KURTZ: I'd have to go back and study it. They  
6 actually have reduced burdens of proof with some of them. So  
7 they made decisions that the Whistleblower Protection Act is  
8 subject to different standards as compared to Bank Secrecy Act.  
9 I haven't gone and done any informed review as to why that  
10 happened -- was it a different Congress, was it a different  
11 interest, was there something else that drove it. But from a  
12 technical standpoint, that amendment amended not only the  
13 Whistleblower Protection Act, but also all the baby  
14 whistleblowing acts that are referenced and picked up and the  
15 Bank Secrecy Act isn't one of them. So it's just as a matter  
16 of law.

17 THE COURT: In other words, the BSA doesn't have  
18 language that serves as a lever or a hook into one of those  
19 other statutes such that it is susceptible of being amended.

20 MR. KURTZ: Correct. There are several that are  
21 amended -- FIRREA -- I'm sorry. I put them on the spot.

22 THE COURT: Final question. Assuming that you prevail  
23 on the motion to dismiss, is there any reason not to give the  
24 plaintiff an opportunity to amend? They have not amended  
25 before.

FCBLTAF

1 MR. KURTZ: They have amended. We filed a motion to  
2 dismiss. Your Honor gave them an opportunity to amend. They  
3 took the opportunity to amend, and I think your Honor might  
4 have ruled they'd have to show good cause. And the reason I  
5 don't think there's good cause is because this -- they still  
6 have a case, your Honor. We still have to deal with this  
7 litigation. But their memo is the whistleblowing. Their memo,  
8 you can't plead around your memo. I know I have reported --

9 THE COURT: Your point is if the memo on its face is  
10 not whistleblowing, since the memo is a fixed thing --

11 MR. KURTZ: Correct.

12 THE COURT: -- there's no reason to give leave to  
13 replead, as opposed to if there were a theory of under which  
14 she was being retaliated against under some statute for her  
15 advocacy not acted upon to report something.

16 MR. KURTZ: Correct.

17 THE COURT: In other words, something like that  
18 conceivably could be the subject of an amendment, but not the  
19 memo is your point.

20 MR. KURTZ: That's correct. And having a pleading  
21 include new creative language to describe the operative  
22 document that's a part of the record doesn't do anything.

23 THE COURT: Thank you. Go ahead.

24 MR. KURTZ: I was going to make my last point. I was  
25 going to point out that the plaintiff has said that no one is

FCBLTAFA

1 going to say it's a possible violation of law, no one is going  
2 to do that. That's actually kind of telling because the people  
3 who do that are whistleblowers. That's what whistleblowers do.

4 And *Balko*, by the way, when I say rogue, I meant an  
5 employee that was acting outside the management scheme as  
6 opposed to on behalf. And certainly if your Honor looks at  
7 *Balko* you'll see that on page, for instance, just one cite on  
8 page -- it's a slip opinion -- page 2, the court notes that  
9 plaintiff was actually instructed to stop investigating the  
10 fraud. And she, ultimately, she didn't put in a complaint on  
11 behalf of her department; she put it in personally. That's the  
12 only point I was making.

13 THE COURT: Thank you. I'll take the case under  
14 advisement.

15 Counsel, you're welcome by the close of business  
16 Monday to submit the memo of citations if you'd like.

17 MR. KURTZ: We'll do that. Thank you very much, your  
18 Honor.

19 o0o  
20  
21  
22  
23  
24  
25